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LOUISIANA CONSTITUTIONAL LAW

Lee Hargrave*

WHO DECIDES CONSTITUTIONAL ISSUES?

Lurking in the short, ostensibly noncontroversial opinion in *In re Brisset*¹ are fundamental questions about the nature of constitutions, courts and quasi-judicial administrative agencies. In *Brisset*, the Civil Service Commission refused, on the grounds of unconstitutionality, to apply a statute providing for awards of attorney's fees in some appeals to the commission;² the Louisiana First Circuit Court of Appeal held that the commission lacked the authority to declare the laws of Louisiana unconstitutional.

The state constitution does not establish in definite terms the power or the procedure for review of statutes that conflict with the constitution.³ In the United States, the practice of judicial review of the constitutionality of statutes developed from the rationale of Chief Justice John Marshall in *Marbury v. Madison*.⁴ Chief Justice Marshall attempted to explain why it is that courts, rather than legislatures, are to decide authoritatively whether a statute conflicts with the constitution; in most other countries, legislatures make such decisions.⁵ The essence of his argument is that, while courts do not have a special role with respect to such questions, judicial review is inherent in the ordinary course of deciding cases:

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . .

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, . . . the court must determine which of these conflicting rules governs the case.

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1. 424 So. 2d 1040 (La. App. 1st Cir. 1982), *cert. granted*, 430 So. 2d 81 (La. 1983).

2. LA. R.S. 42:1451 (Supp. 1983).

3. The closest it comes to doing so is LA. CONST. art. V, § 5(D) which defines the appellate jurisdiction of the supreme court to include cases in which a law or ordinance has been declared unconstitutional.

4. 5 U.S. (1 Cranch) 137 (1803). For Louisiana developments, see *Gumbel v. New Orleans Terminal Co.*, 190 La. 904, 183 So. 212, *cert. denied*, 305 U.S. 654 (1938) (overruled by *Lake, Inc. v. Louisiana Power & Light Co.*, 330 So. 2d 914 (La. 1976) (*St. Julien* doctrine overruled)); *Saint v. Allen*, 169 La. 1046, 126 So. 548 (1930); *State ex rel. Higgins v. Aicklen*, 167 La. 456, 119 So. 425 (1928); *New Orleans & Nw. R.R. v. Town of Vidalia*, 117 La. 561, 42 So. 139 (1906).

5. See generally M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

This is of the very essence of judicial duty.⁶

While *Marbury* was concerned with the powers of courts, its rationale applies as well to administrative agencies that decide cases; in fact, the principle applies to any entity which applies statutes in resolving disputes. As a society becomes more complex and transfers some cases from courts to administrative agencies, those agencies, in deciding the disputes before them, should also share in the power to refuse to apply unconstitutional statutes since the function of deciding disputes involves construing and applying conflicting laws. If the law conflicts with the constitution and is relevant to the dispute before it, the decision-maker ought to be bound to apply the constitution. Although the power has not been authoritatively denied, a federal rule does provide that administrative agencies are not competent to decide constitutional questions or to refuse to apply statutes that are unconstitutional.⁷ That position seems to be eroding, and the trend is toward recognizing the power of administrative agencies to decide such questions.⁸

In Louisiana there are additional considerations, especially with respect to the Civil Service Commission, an agency whose quasi-judicial jurisdiction is established by the Louisiana Constitution of 1974. The constitution assigns to the Civil Service Commission the exclusive power to hear disputes involving dismissal of civil service employees.⁹ It is inherent in the function of deciding those disputes, to paraphrase Marshall, to apply the constitution instead of a conflicting statute. The court in *Brisset* argues that the constitution vests judicial power in the courts and that it is a violation of the separation of powers doctrine for the commission to ex-

6. 5 U.S. (1 Cranch) at 177-78. Indeed, it is arguable that to the extent that administrative agencies are delegated what is normally legislative power, the agency should consider constitutional issues just as a legislator would in drafting legislation. See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1689 (1977).

7. *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968) (Harlan, J. concurring); *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958). The few state cases are cited in 73 C.J.S. *Public Administrative Bodies and Procedure* § 67, 542 n.61 (1983); 1 AM. JUR. 2D *Administrative Law* § 185, 990 nn.8-11 (1962). 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:6, at 434 (2d ed. 1983); 3 *id.* § 20:04, at 74 (1958); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87-109, 438-40 (1965).

8. See *Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n*, 607 F.2d 871 (3d Cir. 1979); *Alcala v. Wyoming State Bd. of Barber Examiners*, 365 F. Supp. 560 (D. Wyo. 1973); *Southern Pac. Transp. v. Public Util. Comm'n*, 18 Cal. 3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976); *Hunterdon Cent. High School Bd. of Educ. v. Hunterdon Cent. High School Teachers' Ass'n*, 174 N.J. Super. 468, 416 A.2d 980 (1980); 4 K. DAVIS, *supra* note 7, § 26:6, at 434; Note, *supra* note 6.

9. LA. CONST. art. X, §§ 3, 12. "The State Civil Service Commission shall have the exclusive power and authority to hear and decide all removal and disciplinary cases . . ." *Id.* art. X, § 12.

ercise constitutional review, a judicial power. But because the constitution itself vests in the commission powers normally termed judicial (ruling on dismissal appeals), invocation of the general separation of powers doctrine does not solve the problem. Indeed, the "judicial" character of commission activity in these matters is confirmed by the constitution itself, which provides that commission orders are reviewed directly by the court of appeals, rather than by the district court.¹⁰

It is true, as the *Brisset* court says in reference to the constitution, that "[n]owhere in these articles is the Commission granted the power or authority to interpret the laws of this state."¹¹ But it is also true that nowhere in the constitution are courts expressly given the authority "to interpret the laws of this state." Courts are given authority to decide cases; in the course of doing so, they construe laws and constitutions. In the same way, the commission is given authority over a type of case; in deciding such cases, it should construe laws and constitutions.

In some countries in which judicial review has been adopted, the constitution itself makes constitutional adjudication a unique role of one or more courts; also, the constitution may provide that a decision declaring a statute unconstitutional results in immediate, country-wide suspension of the statute.¹² American practice is otherwise. Review of constitutionality is not considered a unique, special function of one or more courts. It is, as discussed above, part of the normal, everyday function of deciding cases. As a result, no special procedure exists to suspend the operation of a law that is declared unconstitutional. Indeed, the common phrase "declared unconstitutional" is not correctly used in this context, for there is no declaration. A court or an administrative agency may refuse to apply a statute in a case before it because it conflicts with the constitution, but that refusal does not suspend operation of the law, repeal it, or erase it from the statute books. The case has the same *res judicata* impact and precedential effect as has any other case. Absent a special procedure, it should make no difference that administrative agencies engage in this kind of determination, so long as they do it in the course of deciding the cases they normally decide.

There is no special danger to society if the Civil Service Commission engages in this activity; there is court review of right, probably by direct appeal to the Louisiana Supreme Court under Louisiana Constitution article 5, section 5(D), which is not confined by its terms to appeals from courts.¹³

10. *Id.* art. X, § 12.

11. 424 So. 2d at 1042.

12. See, e.g., GRUNDGESETZ [GG] art. 93 (W. Ger.); KENPO (Constitution) art. LXXXI (Japan); HIEN PHAP (Constitution) art. 81 (S. Viet. 1967, repealed 1974); INDIA CONST. arts. 13, 32, 131-136, 226, 246.

13. The language of LA. CONST. art. V, § 5(D) indicates that a case shall be appealable

This "inherent in the act of judging" analysis leads to the conclusion that a number of state agencies that adjudicate disputes have the power to refuse to apply statutes that conflict with the constitution. The Commissioner of Conservation adjudicates unitization questions;¹⁴ the Environmental Control Commission imposes penalties on defendants;¹⁵ the Louisiana Tax Commission rules on disputes regarding taxes.¹⁶ Indeed, arbitrators required to decide according to the law would seem to be required, not merely permitted, to refuse to apply statutes that are not constitutional.¹⁷

The *Brisset* view, since it treats the matter in terms of a lack of authority, arguably requires an agency to apply a statute even after the highest court of the country has determined that the statute is unconstitutional. Such a view is inconsistent with judicial economy and respect for the authoritativeness of court decisions. It could also result in the liability under 42 U.S.C. § 1983 of commission members acting under color of law to deny rights granted under federal statutes or the United States Constitution.

Perhaps there is a policy argument that some administrative agencies do not have the competence and expertise to decide questions of constitutional law. That may well be true in some instances—but the constitution has already decided that argument in favor of the Civil Service Commission by respecting the commission's competence sufficiently to omit the district court level in review of commission orders.¹⁸

to the supreme court if "a law or ordinance has been declared unconstitutional." The reference is to a type of case, rather than to the court or agency from which the case originates.

14. LA. R.S. 30:4 (1975 & Supp. 1983).

15. LA. R.S. 30:1094 (Supp. 1983).

16. LA. R.S. 47:1836, :1989 (1952 & Supp. 1983).

17. LA. CIV. CODE art. 3110; LA. R.S. 9:4201 (1983).

18. The court cites *Department of Highways v. Constant*, 359 So. 2d 666 (La. App. 1st Cir. 1978), *aff'd as amended*, 369 So. 2d 699 (La. 1979), to support its view that the function of interpreting "the constitution and laws of the state rests exclusively upon the courts." *Brisset*, 424 So. 2d at 1041. But *Constant*'s reference to the subject is related to another issue—the extent to which the drafters of the constitution express an intent that is controlling on the courts. And even then, Judge Landry in *Constant* was careful to state that "[t]he function of interpreting the constitution and laws of the state, in the final analysis, rests exclusively upon the courts." 359 So. 2d at 671. That statement is accurate but not inconsistent with the commission's exercise of the power to judge legislation as being in conflict with the constitution; the commission's determination is subject to judicial review and, in the final analysis, the courts will authoritatively decide the issue. The court also cites *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1975) for the statement that statutes are presumed constitutional and to be enforced "until declared otherwise by a court of competent jurisdiction." *Brisset*, 424 So. 2d at 1042. But that statement is the ordinary reference to the general presumption of constitutionality, and the case did not concern the issue of whether an administrative agency could refuse to apply a statute.

EQUAL PROTECTION

Suits Against Public Officials

The Louisiana Supreme Court in *Detraz v. Fontana*¹⁹ invoked both federal and state equal protection and due process clauses to find unconstitutional a statute requiring that plaintiffs suing a public official must pay the defendant's attorney's fees if the suit is unsuccessful and, to assure such payment, must furnish bond before proceeding with the trial of the case.²⁰ The lower court ordered that a \$15,000 bond be posted, or the demand against defendants would be dismissed. No bond was posted and the claim was dismissed with prejudice. The supreme court reversed.

The classification scheme penalized plaintiffs suing public officials as opposed to plaintiffs suing all other persons; this is not a suspect classification involving race or other stigmatic injury, and thus would not trigger the highest level of scrutiny. Indeed, the court's citation to *F. S. Royster Guano Co. v. Virginia*,²¹ which is considered the Burger court's attempt to articulate an intermediate standard of equal protection review, suggests that an intermediate level of scrutiny is appropriate.

Interestingly, however, Chief Justice Dixon's opinion discusses at some length the background of the statute, convincingly establishing that it was part of a 1960 legislative package aimed at maintaining racial segregation, the particular statute having been designed primarily to discourage desegregation-related suits against members of school boards. That discussion is in marked contrast with the view that courts determining the constitutionality of legislation should not consider legislative motives. While it is often difficult to determine such motives (that fact itself being good reason often to eschew the inquiry), when the evidence exists, it ought to be used. Justice Dixon's use of the sources here in establishing an anti-black animus is a good example of the possibilities available to courts even in the absence of a verbatim record of legislative and committee proceedings. Justice Dixon used (1) other statutes having similar goals adopted at the same session; (2) contemporaneous statutes adopted in another state; (3) law review commentary written just after the adoption of the statutes; and (4) a joint resolution of the legislature.

However, the holding of the case does not depend on this racial motivation analysis. Rather, the holding emphasizes the nonracial class established, *i.e.* the class of plaintiffs suing officials as opposed to plaintiffs in all other lawsuits where such bond is not required. The court had little difficulty accepting the view that the purpose of the classification

19. 416 So. 2d 1291 (La. 1982), followed in *In re Dean*, 429 So. 2d 541 (La. App. 4th Cir. 1983).

20. LA. R.S. 42:261(E) (1965 & Supp. 1983).

21. 253 U.S. 412 (1920).

is to deter suits against public officials. The court even accepted the defendant's contention that the statute's purpose is to deter frivolous suits designed to harass public officials (although the statute is not so limited) but found no support "for the suggestion that suits are brought against public officials for harassment with greater frequency than suits against other defendants."²²

The court's approach is as much an ends analysis as it is a means analysis; the use of a due process argument to support the decision also confirms this view. One could say that the end of the statute was to deter suits (not just frivolous ones) against public officials, and it could easily be concluded that requiring high bonds is certainly a rational way to discourage such suits. In that sense, the statute has a rational basis; it accomplishes what it seeks to accomplish. More to the point, however, is that such a goal is not a permissible one, not a *reasonable basis*. The inquiry is not just whether the classification meets a goal—a presumably neutral inquiry—but whether the goal is an acceptable one—a value-oriented inquiry.²³ In this instance, it is relatively easy to conclude, judging according to fundamental values, that the goal of discouraging such suits is not an acceptable one. Under the view that public officials should be responsible to citizens for their conduct, especially since their status gives them the power to cause more harm than private citizens can, discouraging suits against public officials is unacceptable as a basic value. By combining the themes of due process and equal protection, the court in *Detraz* recognized that discouraging suits against public officials is an unacceptable basis for legislation.

In light of *Detraz*, one can expect litigation of the constitutionality of Louisiana Revised Statutes 13:5105, which provides that no suit against the state, a state agency or a political subdivision shall be tried by jury. The classification is that of plaintiffs suing the state as opposed to plaintiffs suing private defendants similarly situated, much as in *Detraz*. Presumably, the state would assert an interest in prohibiting over-sized verdicts by "runaway" juries after the state's "deep pockets." However, the state would be hard put to show that such a concern is justified. Indeed, the state would have to contend with the fact that the constitution in one aspect makes a contrary assumption since it allows the citizen or the state to demand a jury trial in expropriation matters.²⁴ A further inequality results since the case law allows the state to demand a jury trial when it is a defendant.²⁵

However, the invasion of the individual's interest with respect to be-

22. 416 So. 2d at 1295.

23. See Hargrave, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Louisiana Constitutional Law*, 39 LA. L. REV. 807 (1979).

24. LA. CONST. art. 1, § 4; see also 6 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Aug. 30, 1973, at 1030-67.

25. *Triche v. City of Houma*, 342 So. 2d 1155 (La. App. 1st Cir. 1977); see Maraist,

ing denied a jury trial may not be as great as in the case of the bond requirement in *Detraz*; the bond of \$15,000 was an almost insurmountable obstacle to a private litigant. In the case of section 5105, by contrast, the claim is litigated, and the possible harm goes only to the amount of judgment. As to either the possible injury to the litigant under section 5105 or the possible rational basis for the statute, the availability of appellate review of facts undercuts both arguments since review affords an opportunity to correct any improperly low or high judgment. An additional protection for the state is that any court judgment rendered is not payable without an appropriation,²⁶ so that the state's interest in protecting its fiscal position is amply protected.

Indeed, what emerges is a "low level" equal protection balancing where all considerations have little weight. The individual invasion is slight; the level of scrutiny is slight; the state's interest is slight; alternatives are available to protect the interests on both sides. In such an analysis, one's basic inclination in favor of equality or in favor of the state may well be an important part of the final outcome.

Age Discrimination

One of the most common legislative classifications is based on age. Almost of necessity, the courts apply a low level of scrutiny in testing such age classifications, and the statutes usually survive. In any analysis, one is hard put to establish that an age of majority of eighteen is more rational than one of nineteen or that it is more reasonable to fix mandatory retirement at seventy rather than seventy-one. The leading case is *Massachusetts Board of Retirement v. Murgia*,²⁷ in which the United States Supreme Court upheld a Massachusetts statute providing mandatory retirement at fifty years of age for members of the uniformed state police. The Court applied low level scrutiny and found the statute to be rational as a means of ensuring the physical fitness of state police officers, who must perform duties requiring excellent physical ability.

Similarly, Louisiana Constitution article 1, section 3 does not absolutely prohibit discrimination based on age; rather, it prohibits only "arbitrary, capricious, or unreasonable" discrimination. When the question is not one of line-drawing in statutes, however, and is instead the conduct of a governmental agency in firing an employee *because of the employee's age*, article 1, section 3 should apply. *Mixon v. New Orleans Police Department*²⁸ so held and overturned the firing of a fifty-five-year-old "batty old lady" because of her age.

The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Civil Procedure, 38 LA. L. REV. 503, 509 (1978).

26. See Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 LA. L. REV. 647 (1983).

27. 427 U.S. 307 (1976); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (voting age).

28. 430 So. 2d 210, 212 (La. App. 4th Cir. 1983).

The court found an anti-elderly animus based on the facts determined by the Civil Service Commission, particularly testimony relating to the employee's treatment—lack of assistance as opposed to that given younger employees; failure to invite her to the Christmas party; supervisors' comments about her age; a supervisor's calling her a "batty old lady"; a supervisor's downgrading her appearance, saying "she did not look as good as a twenty-five year old worker."²⁹ Once the court accepted the commission's finding of fact as to the existence of an anti-elderly animus, the conclusion that the dismissal was improper readily followed. Although the court did not address the issue, it appears that differential treatment was not enough—an anti-elderly animus was necessary to invoke the constitutional protection.³⁰

It would be a different case if dismissal was based on lack of ability, including lack of physical ability associated with age, as *Murgia* indicates. An employer should also be able to prove other areas of nonperformance as the basis for the action against an employee. In any event, the focus here will often be on the party who has the burden of proof. If it is a civil service appeal, as in *Mixon*, the burden of proof as to the facts is that specified in Louisiana Constitution article 10, section 8(B), which puts that burden on the employee.

GRANDFATHER CLAUSES

In *City of New Orleans v. Dukes*,³¹ the United States Supreme Court upheld an ordinance which excepted long-term vendors from its prohibition of vendors in the *Vieux Carré*. The court found an adequate basis for the discrimination in the state's interest in preserving the quarter's "tourist-oriented charm in the economy of New Orleans."³² Similarly, *Hutchinson v. City of Gretna*³³ sustained an ordinance prohibiting issuance of licenses to sell fireworks except to persons who had permits at stated times in the past. The fifth circuit found an adequate state interest in prohibiting the proliferation of fireworks sales outlets that would create an unmanageable increase in the work load of the police department. Presumably, the case is on solid ground in finding the health and safety interest in Gretna at least as strong as the interest in the quaintness of the *Vieux Carré*.

29. *Id.* at 212.

30. See generally *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Wright v. Rockefeller*, 376 U.S. 52 (1964).

31. 427 U.S. 297 (1976).

32. *Id.* at 303.

33. 423 So. 2d 1229 (La. App. 5th Cir. 1982).

EUTHANASIA—COURT INTERVENTION TO “UNPLUG” THE RESPIRATOR

Louisiana Constitution article I, section 20 which prohibits euthanasia was deliberately worded to ensure that it prohibited only governmental action. It does not address the more basic and troublesome problem of physicians and relatives halting extraordinary means of maintaining the lives of persons who might otherwise die. Some of those problems, with respect to the newborn, are addressed by Louisiana Revised Statutes 40:1299.36.1-.3, which establishes a duty to care for the newborn, with the exception that such care is not required for a “child in a continual profound comatose state where . . . the child has no reasonable chance of recovery.”³⁴

Since this statute does not require government action to end life, but simply relieves private citizens of the governmentally established duty to maintain life of children in a defined situation, the statute does not run afoul of the constitutional provision. Granted, the line between action and nonaction in some cases may be thin, and governmental encouragement of parents to practice euthanasia could present problems. However, under the posture of *In re P.V.W.*,³⁵ the court with little difficulty held that section 1299.36.1(C) does not violate the constitutional provision:

[E]xtraordinary means of preserving a person's “existence” in an irreversible vegetative coma have little to do with the continuation or the ending of “life”, and removal of such systems under highly restricted circumstances cannot reasonably be construed as violative of the constitutional prohibition against euthanasia. Indeed, the law under review is a warranted exception to the prohibitory rules in Part XIX which were designed to implement the constitutional prohibition against euthanasia when the child is unwanted or the quality of his life will be substantially diminished.³⁶

The court also recognized that it is an appropriate judicial function for courts (here a juvenile court) to decide whether there is a factual basis for determining that the medical requirements of the statute are met. This again is orthodox in Louisiana, where the jurisdictional requirements of a “case” are quite liberal. Indeed, the constitutional reference to district court jurisdiction in terms of “civil and criminal matters”³⁷ rather than “cases” is a recognition of this broad conception of judicial power.³⁸ As a matter of policy, it may well be more appropriate to give that function

34. LA. R.S. 40:1299.36.1(C) (Supp. 1983).

35. 424 So. 2d 1015 (La. 1982).

36. *Id.* at 1022.

37. LA. CONST. art. V, § 16.

38. See Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765 (1977).

to a body more expert in medical matters, but as a matter of power, it is consistent with Louisiana's background to make such issues judicial ones. The requirement that an attorney be appointed to represent the child³⁹ also reflects the adversary character of the proceeding. In this context, it would seem that the attorney who represents the child is not at liberty to argue that it is in the child's best interest for the extraordinary devices to be removed; since the petitioners will be seeking the authority to cease such treatment, the adversary nature of the proceeding impels the attorney to argue in favor of continuing the treatments. Again, this may not be the best policy approach to deciding such issues, but it is the approach that results from having such matters decided by courts.

Remaining after the *P. V. W.* case, however, are some basic problems with the statute itself. In *P. V. W.* the petitioning parents sought a declaration that the child was in a profound comatose state and thus that the duty under subsections (A) and (B) of section 1299.36.1 to continue extraordinary means of care did not exist. The court appointed an attorney to represent the child and on its own motion ordered that the attorney general and the Department of Health and Human Resources be made parties. The district attorney intervened and filed exceptions; the court then ordered that the district attorney be made a respondent. The statute does not provide for bringing in the state agencies and the district attorney. Presumably, the court took such action to achieve some certainty in assuring that the parents and physicians involved would not be subject to criminal prosecution. However, the statute does not by its terms provide immunity from criminal prosecution, as Justice Lemmon recognized in his opinion for the court:

Arguably, a court should not rule on a person's prospective criminal liability for contemplated action. Nevertheless, when the Legislature has excluded a precise situation (sought to be declared as existing in this case) from the prohibition against deprivation of medical treatment, and when the attorney general and district attorneys have been made parties to the particular proceeding, the parents and physicians who honestly and in good faith seeks [sic] a judicial declaration in advance of the occurrence substantially decrease the likelihood of subsequent criminal prosecution.⁴⁰

Justice Dennis, in concurrence, stated that he did not construe the statute as granting any type of civil or criminal immunity.⁴¹

The statute should be more clearly written. It not only fails to ad-

39. LA. R.S. 40:1299.36.3(A) (Supp. 1983).

40. 424 So. 2d at 1021 n.12.

41. *Id.* at 1022 (Dennis, J., concurring).

dress the issue of criminal liability, but it also fails to define the terms *profound comatose state* and *no reasonable chance of recovery*, and to conform its provisions to Louisiana Revised Statutes 9:111, which defines *death* to include absence of brain activity.

Still, despite serious moral problems that arise in dealing with these matters and despite the problems engendered by the statute, it does seem better to keep these basic questions out of the criminal law, which is hardly structured to handle such issues with the expertise and the sensitivity needed. Indeed, one ought to be able to determine rather simply that the appropriate articles of the criminal code are normally not violated when parents and physicians cease to apply extraordinary life-continuing devices. Murder or intentional manslaughter⁴² requires an intent to kill or inflict great bodily harm. What is required is a specific intent—that the defendant actively desire the consequences. In the usual situation, the intent of the parents and physicians is for nature to take its course without the extraordinary devices; there is no specific intent to kill, even if death does follow. A conviction of negligent homicide would not be appropriate, since such careful consideration of whether to continue the treatment hardly qualifies as a gross deviation from the standard of care of a reasonable person. The *Quinlan*⁴³ case which engendered so much attention is in point; when the devices were withdrawn, Karen Quinlan did not die.

PUBLIC RECORDS—PRIVACY

Louisiana Constitution article 12, section 3 grants a right to examine public documents "except in cases established by law." The presumption is in favor of disclosure, and the burden is on those asserting nondisclosure to establish a clear exception. Since Louisiana Revised Statutes 44:1 defines public records quite broadly and because no exception applied, the Louisiana Fourth Circuit Court of Appeal in *Amoco Production Co. v. Landry*,⁴⁴ held that the records of disciplinary hearings before the Board of Professional Engineers and Land Surveyors were available for public inspection.

The provisions of the board's enabling legislation giving it the authority to conduct hearings in private⁴⁵ were not sufficient to establish an exception to the principle of public access to the record of the hearing. This conclusion is consistent with the general practice of allowing public ac-

42. CRIMINAL CODE: LA. R.S. 14:30, :31(1) (1974 & Supp. 1983).

43. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976).

44. 426 So. 2d 220 (La. App. 4th Cir. 1982), cert. denied, 433 So. 2d 164 (La. 1983).

45. LA. R.S. 37:700(E) (1974), repealed by 1980 La. Acts, No. 568, § 1.

cess to records of court proceedings, even though the trial, or parts of it, are private.

Also argued in the case was Louisiana Constitution article 1, section 5, which prohibits "invasions of privacy." While this article is the basis for some development of constitutional protection of privacy,⁴⁶ that protection was inapplicable; the rather vague provisions of section 5 must give way to the more specific provisions of article 12, section 3 and the suggestion implicit there that the activities of public agencies are to be public.

The Louisiana Third Circuit Court of Appeal in *Trahan v. Larivee*⁴⁷ did use article 1, section 5 to protect from disclosure the performance records of municipal employees. However, there is some doubt as to whether the constitution supports that result. The constitution protects private citizens against governmental intrusion; *Trahan*, however, involved a public employee rather than a private citizen in his private capacity. In *Trahan*, the expenditures of public money and the ability of citizens to evaluate the policies of elected officials in spending public money were at issue. While the *Amoco* case did distinguish *Trahan* on a factual basis, *Amoco* is the approach more in keeping with the constitution. Any development of the right to privacy should be addressed toward protecting private citizens against government intrusion rather than toward preventing citizens from obtaining information about governmental agents and employees. In a similar approach, the federal Second Circuit has recently held that the constitutional rights of city employees were not infringed by a statute permitting disclosure of financial information required to be filed by all city employees earning more than \$30,000 per year.⁴⁸

DUE PROCESS—CHANGE IN PRESCRIPTIVE PERIOD

In *Reichenphader v. Allstate Insurance Co.*,⁴⁹ the Louisiana Supreme Court followed the standard analysis in deciding that a statute shortening a prescriptive term would apply to existing incomplete periods, so long as a person has a reasonable time after the change to pursue the action; the court also decided that a period of almost nine months from the time of promulgation of the act was a reasonable period of time. In both of these matters, the court is on traditional ground.⁵⁰

46. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 20 (1974).

47. 365 So. 2d 294 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 564 (La. 1979).

48. *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983).

49. 418 So. 2d 648 (La. 1982).

50. See Hargrave, *Developments in the Law, 1981-1982—Louisiana Constitutional Law*, 43 LA. L. REV. 505, 509 (1982); Hargrave, *Developments in the Law, 1980-1981—Louisiana Constitutional Law*, 42 LA. L. REV. 596, 601 (1982).

A recent Note⁵¹ in the *Louisiana Law Review* discussed the merits of applying a more moderate approach to enforcing statutes changing periods of prescription through the use of proportionate prescription, as was common in the early jurisprudence of the state. This approach is still a "retroactive" application, for it affects existing periods, but it is less extreme for it gives credit for time run as per the original period; if for example, fifty percent of an existing period had run (five of ten years, for example), it would be required that fifty percent of the post-enactment period be complete (one of two years, for example) before prescription would run. As the Note indicates,⁵² the approach has fallen into disuse in favor of the simpler due process analysis, and the supreme court rejected a recent attempt to revive it.⁵³

Although reasonable minds could differ on the subject, there are good reasons to have departed from proportionate prescription and to apply the new period in its entirety to an existing claim. On the formal level, this construction is the apparent meaning of the constitutional provisions that establish a statute's effective date.⁵⁴ If the statute purports to regulate the bringing of actions, it must be given effect as to all actions filed after that effective date. If the statute provides, as in the example above, that all actions on a certain kind of claim must be brought within two years of an event, it applies by its terms to all actions, no matter when they arose. Strictly speaking, this is not "retroactive" application of anything; it is simply applying laws regarding court procedure from the effective date of the new statute. This simple analysis then incorporates the due process guarantee and allows the change to be so applied as long as there is a "reasonable" time for citizens to bring the action after the change.

As the Note recognizes,⁵⁵ proportionate prescription would not supplant the due process part of the analysis, for the doctrine can result in so short a period to bring the action as to be unconstitutional. Simplicity then is in favor of the current approach. It is also recognized that proportionate prescription's effects are not applicable when a statute terminates a prescriptive period,⁵⁶ in effect making the new prescriptive period zero.

There probably is more at stake than formal application of the constitution and simplicity. The current view gives more effect to the latest statement of public policy enunciated by the legislature; it is more faithful to the legislative will by giving effect to that will more rapidly than under

51. Note, *Proportionate Prescription—An Alternative for Applying Changes in Liberative Prescriptive Periods*, 43 LA. L. REV. 777 (1983).

52. *Id.* at 779.

53. *Matthews v. Insurance Co. of N. Am.*, 418 So. 2d 582 (La. 1982).

54. LA. CONST. art. III, § 19.

55. Note, *supra* note 51, at 783-84.

56. *Id.* at 781.

proportionate prescription. One could also speculate that the older cases were decided when the traditional legal view gave more weight to conceptions of "vestedness" in existing prescriptive periods. Modern constitutional law developments have recognized more forthrightly the governmental power to end or change such inchoate periods and to acknowledge that there is not strong reliance on such expectations.

SUNDAY CLOSING LAWS

As suggested in prior comments in this symposium, Sunday closing laws are being struck down in more and more states.⁵⁷ In Louisiana, the legislative background of those laws continues to reinforce a record that would make those laws suspect on both establishment and equal protection grounds.

The debate during the 1983 legislative session on bills to repeal or liberalize the statutes prohibiting certain businesses from operating on Sundays disclosed religious motivation for those laws on the part of some proponents.⁵⁸ While motive in legislative bodies may often be hard to determine and may be a hazardous enterprise, when it is apparent, it should not be ignored, as Justice Dixon's opinion in *Detraz v. Fontana*⁵⁹ indicates.

The catalog of exceptions, both as to types of merchandise that can be sold, and as to geographic areas where items can be sold on Sundays, continues to proliferate. The area of the New Orleans Worlds Fair⁶⁰ and the historic redevelopment area known as Catfish Town in Baton Rouge⁶¹ join the *Vieux Carré*⁶² in being exempt from the Blue Laws. Of course, there are the local ordinances throughout the state that make similar

57. Hargrave, *Developments in the Law, 1979-1980—Louisiana Constitutional Law*, 41 LA. L. REV. 529, 542 (1981); see *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979); *People v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976); *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978); *Vermont v. Shop & Save Food Mkts.*, 138 Vt. 332, 415 A.2d 235 (1980).

58. Ken Ward, representing the Louisiana Moral and Civic Foundation, spoke against the bill. "The law has been changed piecemeal, and the result has been the present law as we have it, is often misunderstood, disregarded and made fun of. . . . Church-goers would be greatly hindered in their day or [sic] worship and in their family activities if they were required to work on Sunday" *State Times* (Baton Rouge), May 31, 1983, at 1-B, col. 1, 2-B, cols. 1-2. James Stovall, representing the Louisiana Interchurch Conference, said "the quality of life is improved when we have one day in seven which is free of consumerism." *Id.* at 2-B, col. 2.

59. 416 So. 2d 1291 (La. 1982). See *supra* text accompanying notes 19-26.

60. 1983 La. Acts, No. 546, § 1 adding LA. R.S. 51:192(A)(25) or 1983 La. Acts, No. 726, § 1 amending LA. R.S. 51:192(A) (Supp. 1983); 1983 La. Acts, No. 726, § 1 adding LA. R.S. 51:194(E)(4).

61. 1983 La. Acts, No. 257, § 1 adding LA. R.S. 51:194(E)(4).

62. LA. R.S. 51:194(E)(3) (Supp. 1983).

exceptions.⁶³ It is becoming more difficult to find a rational basis for these many distinctions and classifications.

REVIEW OF GOVERNMENT DENIALS OF REQUESTS

The Louisiana Supreme Court in *Kel-Can Investment Corp. v. Village of Greenwood*⁶⁴ concluded on statutory grounds that decisions of municipalities *refusing* to grant annexation or deannexation petitions are not subject to judicial review. Under the court's analysis, only actions *granting* petitions to annex or deannex are subject to court review. The court reasoned that the statute provides only that "ordinances" are subject to review and that if a petition is not acted on favorably, there is no ordinance to review.⁶⁵ Justice Lemmon dissented, arguing that "[a]doption of the motion denying the petition should be viewed as the equivalent of an ordinance declining deannexation. It is the official action of the municipality, and not the ordinance which evidences that action, which is subject to judicial review."⁶⁶

The opinion does not discuss the constitutionality of this interpretation of the statute,⁶⁷ and it does not appear that the issue was raised.⁶⁸ However, there is substantial doubt that the scheme of review thus established is consistent with due process. There are also some equal protection problems.

While the distinction between review of "ordinances" as opposed to inaction may be a valid aid in construing the statute,⁶⁹ it is not dispositive of the constitutional issues. It seems well settled that conduct by government denying a right or request constitutes state action for purposes of the fourteenth amendment to the United States Constitution⁷⁰ and for ap-

63. See SHREVEPORT, LA., CODE OF ORDINANCES § 21-33 (1971); SULPHUR, LA., CODE OF ORDINANCES § 10-27 (1970).

64. 428 So. 2d 401 (La. 1983).

65. LA. R.S. 33:174 (1951).

66. 428 So. 2d at 406.

67. There is, however, substantial authority in the state cases for the court to construe such statutes as providing review to avoid constitutional problems; *Bowen v. Doyal*, 259 La. 839, 253 So. 2d 200 (1971); *Meyer v. Board of Trustees*, 199 La. 633, 6 So. 2d 713 (1942); *Pettit v. Penn*, 180 So. 2d 66 (La. App. 2d Cir. 1965), *writ refused*, 248 La. 696, 181 So. 2d 397 (1966); *Parker v. Board of Barber Examiners*, 84 So. 2d 80 (La. App. 1st Cir. 1955).

68. The court of appeal reviewed the action of the municipality and found it to be unreasonable. 418 So. 2d 669 (La. App. 2d Cir. 1982). The supreme court reversed on statutory grounds. Neither opinion discussed the constitutional issues.

69. The statute speaks in terms of the municipality's adopting an ordinance to effect the annexation or contraction. If it chooses to deny the petition, no ordinance is adopted. See generally LA. R.S. 33:171-:179 (1951).

70. The forerunner of the racial discrimination developments, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), involved a Chinese alien who was refused a permit to operate a laun-

plication of state constitutional guarantees.⁷¹ Indeed, the distinction between action and inaction is generally not a helpful one in most instances. Failing to admit blacks—inaction—to public facilities on the basis of race is inaction subject to equal protection review; but this failure is also action in the sense of admitting whites only. If government occupies property without compensation, there is due process relief for the failure to compensate; but there is also action in occupying the property. In the instant case, there was a failure to adopt an ordinance, but there was also the action of considering and ruling on a petition that had been submitted. In any event, there should be little doubt that conduct by government is involved and that such conduct is subject to review for its constitutionality. Review would come under a number of possible claims, but the most relevant ones are due process and equal protection.

Due Process

The court in *Kel-Can* acknowledged that ordinances granting petitions for annexation or deannexation are subject to review. This conclusion presumably comes in part from the text of Louisiana Revised Statutes 33:174, which specifically states that the question before the court "shall be whether the proposed extension is reasonable." This statutory directive to consider reasonableness is apparent, but there is more to the matter.

All government action depriving life, liberty or property is subject to review to see whether the deprivation accords due process of law. This constitutional review of arbitrariness, capriciousness or reasonableness is a basic guarantee that cannot be removed by statute.⁷² The cases had not suggested a different standard of review based on statutory language from that based on the constitutional guarantee, although that is a possible approach.

dry and then was convicted under an ordinance making it a crime to operate a laundry without a license. The current debate is whether inaction by a state in failing to act to require equal protection by some private interests denies equal protection. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Bell v. Maryland*, 378 U.S. 226 (1964).

71. See cases cited *supra* note 67; see, e.g., *Hagood v. Pickering*, 385 So. 2d 405 (La. App. 1st Cir. 1980) (denial of request for authorization to open a bank); *Newell v. Orleans Parish School Bd.*, 370 So. 2d 655 (La. App. 4th Cir.), *cert. denied*, 373 So. 2d 531 (La. 1979), *cert. denied*, 444 U.S. 1043 (1980) (denial of request for sabbatical leave); *Harrison v. Morehouse Parish School Bd.*, 368 So. 2d 1113 (La. App. 2d Cir. 1979) (failure to provide bus service to some students); *Werner v. Board of Trustees*, 360 So. 2d 615 (La. App. 4th Cir. 1978) (denial of request for disability pension); *Pomeroy v. Towns of West Lake*, 357 So. 2d 1299 (La. App. 3d Cir.), *cert. denied*, 359 So. 2d 205 (La. 1978) (denial of request for a zoning change); *Schwing v. City of Baton Rouge*, 249 So. 2d 304 (La. App. 1st Cir.), *cert. denied*, 259 La. 770, 252 So. 2d 667 (1971) (denial of building permit).

72. This is the essence of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *supra* text accompanying notes 4-8; *Meyer v. Board of Trustees*, 199 La. 633, 6 So. 2d 713 (1942); *Parker v. Board of Barber Examiners*, 84 So. 2d 80 (La. App. 1st Cir. 1955); *Pettit v. Penn*, 180 So. 2d 66 (La. App. 2d Cir. 1965), *writ refused*, 248 La. 696, 181 So. 2d 397 (1966).

The inquiry under this review at the outset is whether the petitioner has been deprived of life, liberty or property. While one might have some difficulty finding, in the abstract, a substantial individual interest in being incorporated in a municipality or in not being part of a municipality, the issue need not be pursued as an open question. The state has already determined, by granting review in some instances, that there is a substantial individual interest in being in or out of a municipality. That should be adequate persuasive authority for the court, without exercising its own discretion or applying its own views about such matters, to simply accept the legislature's determination that such interests are substantial. Once that determination is made the court would then decide the reasonableness of the action under its normal substantive due process analysis.⁷³

Equal Protection

The statutory scheme, as construed, allows judicial review of grants of petitions but not of denials. While this is not an area in which there is a suspect class, it is difficult to find a rational basis for making this classification. Petitions to annex and deannex are treated the same: if either is granted, whether it be to enlarge or construct, there is review; if either is denied, there is no review. Indeed, if the concern is with individual rights, the opposite ought to be the case—review when there is a denial but not when there is a grant. In any event, the question is access to judicial review, something that should be rather fundamental in our scheme of things⁷⁴ and which ought to merit substantial scrutiny, and for the denial of which there seems to be no strong interest.

73. See Hargrave, *supra* note 23, at 813; Hargrave, *supra* note 46, at 4.

74. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Douglas v. California*, 372 U.S. 353 (1963). These two cases also illustrate the apparent interchangeability of substantive due process analysis and what is referred to as "substantive equal protection." *Boddie* analyzed access to courts for divorces in due process terms; *Douglas* analyzed access to judicial review on appeal in equal protection terms; in any event, access to judicial review is determined, under either analysis, to be a basic and important interest requiring a high level of justification if a state denies that access.

